
**United States Court of Appeals
For the Ninth Circuit**

RICHARD L. DEHART and PHOEBE D. DEHART, his
wife, d/b/a DEHART OIL COMPANY, *Appellants*,

vs.

RICHFIELD OIL CORPORATION, a corporation, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

OPENING BRIEF OF APPELLANTS

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FILED

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tion, *Appellee.*

No. 21597

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

OPENING BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on the District Court pursuant to Title 28, United States Code, Section 1332, diversity of citizenship and jurisdictional amount. Plaintiffs are citizens of the State of Washington, and defendant is a corporation incorporated under the laws of Delaware. The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs. (Tr. 6).

Jurisdiction of the Court of Appeals is conferred by Title 28, United States Code, Section 1291, Final

decisions of District Courts. A final decision was entered in this case by the District Court, November 23, 1966. (Tr. 78).

STATEMENT OF THE CASE

The Appellants entered into an agreement with Appellee on or about February, 1956, to, among other things, distribute at wholesale, appellee's gasoline and petroleum products. Appellee was to provide gasoline under terms and conditions set in part by market prices. The breach of that agreement by the Appellee is the subject of the lawsuit now being appealed. This lawsuit was commenced December 20, 1965, in the Superior Court of Snohomish County of the State of Washington. Defendant petitioned for removal to the United States District Court on December 30, 1965.

The case at bar came on for Summary Judgment only after extensive pre-trial activity. Significantly, plaintiffs' discovery efforts were thwarted at every point by the Court's decisions on their motion to produce and defendants objections to plaintiffs' interrogatories. On the other hand, defendant's discovery proceeded unmolested. These decisions were but a prelude to the Summary Judgment granted defendant on November 8, 1966, on its contention that no genuine issues of material facts existed because the prior action, No. 5145 constituted collateral estoppel.

The prior lawsuit, No. 5145, instituted on or about October, 1960, by the DeHarts and their four incorporated retail gasoline stations against Richfield Oil Corporation and naming numerous co-conspirators, alleged violations of certain Federal Anti-trust

laws and claimed damages thereby. That action, Civil Action No. 5145 in the United States District Court for the Western District of Washington, Northern Division, was also decided by Judge William T. Beeks.

A separate trial was had in No. 5145 on defendant's cross-complaint for enforcement of a "Memorandum of Settlement Agreement" signed by defendant and the then attorney for the plaintiffs. The sole issue before that court was to determine whether the attorney had authority "to compromise the claims set forth in that complaint" and to execute the "Settlement." The Court in its "Findings of Fact," No. 3 (Tr. 35) found that he was authorized to that extent and entered its Judgment November 30, 1964, dismissing the Complaint and ordering the plaintiffs to execute the necessary documents to carry out the terms of the "Settlement." An appeal was not taken not because it lacked merit but because the DeHarts were almost destitute and without counsel. (Tr. 367).

SPECIFICATIONS OF ERRORS

THE COURT ERRED:

1) In granting Summary Judgment in favor of defendant and Judgment of Dismissal.

2) In granting defendant's Motion to Strike Plaintiffs' Jury Demand.

3) In sustaining Objections of Defendant to Plaintiffs' Interrogatories and denying plaintiffs' Motion for Production of Documents.

STATEMENT OF APPELLANTS' POINTS ON APPEAL

1) The District Court erroneously considered United States District Court for the Western Division of Washington, Northern Division, Civil Action No. 5145 as collateral estoppel on all fact issues present in this case.

2) Plaintiffs did not surrender all causes of action against defendant when the "Settlement" was executed.

3) A cause of action based on breach of contract is not surrendered when a cause of action based on Federal Anti-Trust violations is surrendered.

4) The intention of the parties to a "Settlement" may be shown by the "Settlement" itself and parol evidence explaining the "Settlement." The latter is an issue of fact which precludes Summary Judgment.

5) An agent's authority to settle all claims of his principal is not adjudicated by a judgment finding he was authorized to settle one particular lawsuit.

6) The District Court's Order Granting Objections of Defendant to Plaintiffs' Interrogatories and Denying Plaintiffs' Interrogatories and Denying Plaintiffs' Motion for Production of Documents prejudiced Plaintiffs' ability to contest Defendant's Motion for Summary Judgment.

7) Plaintiffs' First Jury Demand should have been honored by the Court under the facts alleged in Plaintiffs' uncontroverted affidavit.

8) The District Court's Order denying Plaintiffs' discovery was erroneous since discovery was directed at the issues of the case.

ARGUMENT

I. Summary Judgment By the District Court Was Erroneous

The principal question on appeal is whether Summary Judgment was erroneously granted the defendant, Richfield Oil Corporation by the District Court. Appellants contend that Summary Judgment was erroneously granted for three principal reasons:

1) Genuine issues as to material facts exist precluding Summary Judgment;

2) A prior judgment deciding only one point involved in the present case does not constitute collateral estoppel as to all fact issues presented in this case.

3) The District Court's order overruling plaintiffs' discovery efforts was in error and prejudiced plaintiffs' ability to contest defendant's Motion for Summary Judgment.

Before discussing the merits of the appeal, it is well to reiterate some points regarding Summary Judgment under Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A. Appellants are entitled to have the pleadings, depositions, affidavits, etc., and the facts they contain, examined in the light most favorable to them. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 7 L. ed.2d 458, 82 Sup. Ct. 486 (1962). The *Poller* case also points out that Summary

Judgment should be used sparingly where motive and intent play leading roles.

The fact that other lawsuits have been brought between the parties does not by itself mean Summary Judgment is appropriate. In *Arnstein v. Porter*, 154, F.2d 464 (C.C.A.2d 1946), the Court of Appeals, in reversing a summary judgment, said,

“[a]bsent the factors which make up *res judicata* (not present here), each case must stand on its own bottom, . . . Succumbing to the temptation to consider other defeats suffered by a party may lead a court astray.” [p. 475].

The *Arnstein* case closely parallels the instant case in fact and law. It should be apparent that previous litigation and extended pre-trial efforts are not determinative merely because the defendant is vexed.

1. Genuine Issues As To Material Facts Exist Precluding Summary Judgment

Summary Judgment was granted defendant on the basis of a “Memorandum of Settlement Agreement” which was held enforceable in United States District Court, Western District of Washington, Northern Division, Civil action No. 5145. In Appellee’s own words, that judgment “was concerned solely with the question of the enforceability of the Memorandum of Settlement executed by attorneys for the parties.” (Tr. 119). This is further limited by the District Court’s Findings of Fact,” No. 3 in No. 5145:

“3. Plaintiffs, and each of them, instructed and authorized Dwyer to compromise the claims set forth in the complaint herein on the terms con-

tained in the "Memorandum of Settlement Agreement." (Defendant's Exhibit A) and to execute said agreement on plaintiffs' behalf." (Tr. 277 — emphasis added).

An examination of the "Memorandum of Settlement Agreement" confirms the correctness of the District Court's "Finding of Fact" No. 3. The "Settlement" was intended to resolve the three lawsuits specifically enumerated therein. There is no evidence whatsoever that the then attorney for plaintiffs was authorized to settle all of plaintiffs' claims without limitation. The only point adjudicated was the attorney's authority to settle the particular lawsuits. Not yet adjudicated is the prior attorney's authority to settle claims other than those involved in the lawsuit which he was retained to prosecute and the intention of the parties when they signed the settlement. It is plaintiffs' contention that upon trial of these fact issues it will be proved that they did not surrender their cause of action based on breach of contract.

This case is similar to *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (C.C.A. 2nd 1946) where Judge Learned Hand passed upon the extent of an attorney's authority to compromise a claim and a jury's determination that the attorney's authority had been limited. Circuit Judge Swan, dissenting, makes clear his view that the cause should be "remanded for a new trial in which the issue of what claims the attorney was authorized to settle shall be clearly submitted to the jury" (*Supra*, p. 770). It should be undeniable that where the extent of a agent's authority is in issue, a genuine issue as to a material fact exists precluding summary judgment.

The question of the intentions of the parties to a contract may not properly be resolved on a motion for summary judgment. *Empire Electronics Co. v. United States*, 311 F.2d 175 (C.C.A. 2nd 1962); *Baxter v. Lance Industries, Inc.*, 213 F. Supp. 92 (1963). The case at bar has no interpretation of the "settlement," except that for purposes of civil action No. 5145 the agent was authorized to sign it. The scope of the settlement is not a question of law but a question of fact based on the intentions of the parties who signed it. The adequacy of the consideration given for the "settlement" is also unresolved.

The standard to be applied is to:

"view the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn. 'If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.' *Ramsouer v. Midland Valley R. Co.*, 135 F.2d 101, 106 (C.C.A. 8th 1943). This admonition should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions." *Empire Electronics Co. v. United States*, *supra*. p. 180.

For the reasons given above, substantial issues of material fact exist precluding Summary Judgment. Summary Judgment by the District Court was erroneously granted.

2. Prior Litigation Does Not Constitute Collateral Estoppel

The doctrine of collateral estoppel precludes re-litigation of previously decided issues, as between the identical parties, in a subsequent action based on a different cause of action. It is submitted that the prior action, No. 5145, decided but one issue relevant to this lawsuit which is that the agent involved had authority to settle the claims involved in that lawsuit. That prior suit is *res judicata* only as to that issue. *Baxter v. Central West Casualty Co.*, 186 Wash. 459, 58 P.2d 835 (1936); Restatement, Judgments (1942) § 68; 30A Am. Jur. Judgments, § 373.

A. Different Fact Issues Are Presented.

The proponent of a motion for Summary Judgment has the burden of proving that no genuine issues as to material facts exist. *Rankin v. King*, (C.C.A. 9th 1959) 272 F.2d 254. Here, the purported proof is the Findings of Fact entered in No. 5145. Numerous questions of fact remain unadjudicated including the sufficiency of the purported consideration; if, as Appellee contended, Appellants surrendered all their claims. It has already been shown that that judgment was based on one narrow question of fact. It does not work *res judicata* unless this cause of action was merged in that judgment.

B. Difference Causes of Action Are Asserted.

The present action is based on a breach of contract. The prior suit which is asserted as *res judicata* was based on violation of the Federal Anti-trust Laws. It is difficult to imagine that a claim for breach of contract would be barred by a judgment in an anti-

trust suit. Rather, Appellee is pressed to contend that by the "settlement" Appellants relinquished all claims against Appellee. This has not been adjudicated.

Under the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 83 L. Ed. 1118, federal courts must look to state law for answers to substantive questions. Washington law on res judicata is summarized in *Symington v. Hudson*, 40 Wn.2d 331, 243 P.2d 484. The concurrence of four items is necessary to make a prior judgment res judicata in a subsequent action. They are: (1) identity of subject matter; (2) identity of cause of action; (3) identity of persons and parties; and (4) identity in the quality of the persons for or against whom the claim is made. The absence of any one of these items invalidates the assertion of res judicata.

The subject matter of Civil Action No. 5145, was, among other things, the alleged ruthless conspiracy by Appellee and the named co-conspirators to deprive the plaintiffs in that lawsuit of a source of gasoline. The cause of action was based on a statutory right of action. The case at bar is founded upon a breach of contract under which the Appellant was obligated to, among other things, supply Appellant with gasoline and financing under specified terms and conditions. Some of the terms were keyed to market prices. The dissimilarity of the two cases is obvious. Res judicata is inapplicable to the case at bar. It is submitted that as a matter of law, summary judgment was erroneous.

3. The District Court's Order Granting Objection of Defendant To Plaintiff's Interrogatories And Denying Plaintiff's Motion For Production Of Documents was in error and prejudiced Plaintiffs' ability to contest Defendant's Motion For Summary Judgment.

The District Court made a sweeping order October 18, 1966, which denied all of Appellants' discovery motions (Tr. 318). On October 25, 1966, defendant filed its Motion for Summary Judgment which was granted November 23, 1966 (Tr. 382). It is submitted that the denial of Appellants' discovery motions was in error and seriously prejudiced their ability to oppose the motion for Summary Judgment. Further, the denial of those motions indicates that the District Court was predisposed as to the facts such discovery would elicit.

Appellants ought to have been permitted discovery as requested in their motions (Tr. 182 and 300). A review of the interrogatories indicates they were designed to discover information relevant to the terms and conditions of the contract which is the subject of this suit, the meaning of certain defenses raised by defendant and facts concerning the settlement. This is documented by "Plaintiffs' Brief on Defendant's Objections to Interrogatories" (Tr. 301).

A comparison of the interrogatories which plaintiffs were required to answer and those which defendant was not required to answer reveals some inconsistencies in rulings by the District Court. For instance, defendant was permitted to ask,

"5. Do you contend that the Judgment and Decree in that certain action . . . being Civil Action No. 5145 . . . is void or voidable?" (Tr. 79, 80).

but plaintiffs were not permitted to ask,

“23. In what respects are the plaintiffs ‘duty bound’ by the Judgment and Decree in Cause No. 5145 before this Court,” (Tr. 187).

Many of plaintiffs’ interrogatories were directed to the status of the “Settlement” adjudicated in No. 5145. Defendant successfully asserted they were irrelevant to any issues in this case despite the fact that its principal defense was grounded on the scope and strength of the “Settlement” (Tr. 222-228).

Because discovery was denied, Appellants were not able to contest Appellee’s affidavits in support of Support of Summary Judgment. Appellants, by their affidavit, stated their beliefs about what they expected discovery to reveal. Summary judgment should not be granted where the party against whom it operates has not had the opportunity to prepare by discovery to meet the issues raised thereby. *Hathaway Motors v. General Motors Corporation*, 19 F.R.D. 359 (1955).

**II. THE DISTRICT COURT’S “ORDER GRANTING
MOTION TO STRIKE JURY DEMAND” AND
“ORDER DENYING PLAINTIFFS’ MOTION TO
AMEND COMPLAINT, GRANTING DEFENDANT’S
MOTION TO STRIKE PLAINTIFFS’ SECOND
DEMAND FOR JURY, SUSTAINING OBJECTIONS
OF DEFENDANT TO PLAINTIFFS’
INTERROGATORIES AND DENYING PLAINTIFFS’
MOTION FOR PRODUCTION OF DOCUMENTS”
WAS ERRONEOUS.**

Assuming the Court’s concurrence with Appellants’ position that Summary Judgment was improperly

granted, the Court is asked to overrule two orders which were not appealable until a final Judgment was entered.

1. Plaintiffs' First Jury Demand Should Have Been Granted By the Court.

Under Federal Rules of Civil Procedure Rule 38(d), 28 U.S.C.A., Appellants had waived their right to a trial by jury in this case. However, the trial court has discretion to relax the time requirement where special circumstances are shown to exist. 2B *Federal Practice and Procedure* § 892, Barron and Holtzoff (1961). It is submitted that special circumstances justifying the exercise of such discretion were present and that the Court abused its discretion by not permitting plaintiffs' jury demand to stand. *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447 (C.C.A. 9th 1960).

Plaintiffs filed this jury demand on January 28, 1966 (Tr. 44). Defendant filed its "Motion to Strike Demand for Jury" on February 17, 1966 (Tr. 53). The special circumstances which require the exercise of the Court's discretion in this case is the uncontroverted affidavit of James M. Healey filed May 12, 1966 (Tr. 115). In the affidavit counsel for Appellants relates his understanding with counsel for Appellee that, "all proceedings, either by the plaintiffs or the defendant were stayed by agreement until after the plaintiffs' petition for removal could be heard" (Tr. 115). It is submitted that an uncontroverted misunderstanding between counsel should be reason enough for the exercise of the Court's discretion on this matter. *Arnold v. Trans-America Freight Lines*, 1 F.R.D. 380 (1940).

2. Defendant's Objection to Plaintiffs' Interrogatories should have been overruled and Plaintiffs' Motion for Production of Documents should have been granted.

Under "I Summary Judgment by the District Court was Erroneous," No. 3 of this brief (Brief p. 11), Appellants have elaborated their reasons why they were prejudiced in preparing to meet the motion for summary judgment by the court's rulings which denied them discovery. For the same reasons, the rulings prejudice Appellants' ability to prepare for trial. It is possible for the court to reverse the Summary Judgment without ruling that the Order Denying Plaintiffs' Discovery Motions was improper. For this reason, Appellants specifically assign as error, the District Court's "Order Denying Plaintiffs' Motion To Amend Complaint, Granting Defendant's Motion To Strike Plaintiffs' Second Demand For Jury, Sustaining Objections Of Defendant to Plaintiffs' Interrogatories And Denying Plaintiffs' Motion For Production of Documents" (Tr. 318).

III. CONCLUSION

Appellants have shown that the District Court's Order Granting Defendant Summary Judgment was erroneous because genuine issues of material facts exist and because, as a matter of law, the prior action, No. 5145, does not represent res judicata nor collateral estoppel except as the one issue decided by the adjudication. Summary Judgment was improper for the additional reason that the court's order denying them discovery was erroneous and prejudiced their ability to show that genuine issues as to material facts existed.

Assuming the court reverses the Summary Judgment, it is then asked to reverse two orders entered by the District Court. The first order assigned as in error is the District Court's failure to allow plaintiffs' jury demand to stand. The lower court abused its discretion by not giving credence to the uncontroverted understanding between counsel. The second order wrongfully cut off all of Appellants' discovery efforts leaving them without the means to effectively prepare for trial.

Based on the foregoing, Appellants respectfully request the Court to reverse the Summary Judgment and remand the case for jury trial with complete discovery as permitted under the rules.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with the rules.

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